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No. 164

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

AYAKO HONDA, ET AL., *Petitioners,*

v.

NICHOLAS DeB. KATZENBACH, ATTORNEY GENERAL OF THE UNITED STATES, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

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The Government's prolonged exercise in technicalities cannot obscure its total evasion of the issue of justice and equity; its Brief would be more appropriate to a suit by the Chase Manhattan Bank or the General Motors Corporation than to one by 4100 Japanese-Americans with small savings deposits and legal and language barriers as well. Not once in its Brief does the Department of Justice deny that the result it seeks from this Court is as manifestly unjust as petitioners have urged, and as both the dissenting and majority opinions below found it to be. In a case arising from summary Government taking, and bristling with constitutional issues, perhaps nothing more need be said than to note the Government's failure to deny the injustice which flows

from the divestiture of thousands of Japanese-American claimants—persons whose statutory debt claims the Government concedes to be valid unless now foreclosed by the expiration of the 60-day limitation period. To leave no point in doubt, however, we file this response to correct some serious errors of fact and law in the Government's Brief.

1. *Misrepresentation.* The Government's principal contention is that it was not guilty of any deliberate misrepresentation to petitioners, and that accordingly no estoppel or tolling of limitations may be invoked against it. But while fraud or misrepresentation are compelling grounds for equitable estoppel or tolling of limitations, they are not indispensable. Federal courts (See Pet. Br. p. 28) have rejected so narrow a test, and have instead invoked equitable suspension of limitations even in the absence of misrepresentation where compelled by fundamental considerations of justice. This Court, too, has so ruled. In *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, 428-429, the Court suspended limitations for reasons entirely apart from the defendant's conduct, where plaintiff's mistake of venue had caused the expiration of the statutory period. And in *Stearns Co.* v. *United States*, 291 U.S. 54, 59-61, this Court *specifically applied limitations-estoppel on behalf of the Federal Government against a taxpayer even in the absence of any misrepresentation.* It did so because injustice would otherwise have resulted since the Government had failed to sue within the statutory limitations period while engaged at the taxpayer's own request in administrative re-investigation of the tax assessment.

In the *Stearns* case the Government (Supplemental Brief for the United States, pp. 2-3) represented to this Court—directly contrary to its present assertion—that misrepre-

sentation is *unnecessary* for judicial invocation of equitable estoppel of limitations:

> "The petitioner attacks the Government's defense of equitable estoppel as being ill-founded under established rules prescribing the requisite elements of such a defense. The Government invokes what this Court has described as 'the vital principle' of equitable estoppel . . . *Dickerson* v. *Colgrove*, 100 U.S. 578, 580. ***Misrepresentation of existing fact is not necessary in order to make the principle applicable.*** No such element was required by this Court in the *Colgrove case*, where the plaintiff was held to be estopped to assert title to land because his predecessor in title had disavowed the intention of asserting his claims against others then in possession" (emphasis supplied).

We cannot believe that now, when the shoe is on the other foot, the Government can reverse direction and persuade this Court that limitations-estoppel necessarily requires fraud or misrepresentation. Against so narrow a standard nothing speaks as persuasively as the Government's eloquent silence on this Court's *Stearns* ruling; the Court will look in vain for any reference to *Stearns* in the Government's Brief in the present case or in *Crown Coat*.[1]

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[1] We cannot refrain from noting that the Circuit Court's ruling presently under review in *Crown Coat Front Co.*, No. 371, appears to fly directly in the face of *Stearns*. The limitations suspension which the Circuit Court denied to the Crown Coat Company during the pendency of administrative agency proceedings, is precisely the suspension which this Court granted the Government in *Stearns* during the pendency of the administrative proceedings there. The conflict, we submit, can be justified only on the basis of the Government's sovereign immunity argument, which we find unlikely in *Crown Coat* and which, for constitutional reasons, is in any event unavailable to the Government in the present case (see *infra*, p. 10).

2. *The equities.* Apart from the Government's redundant insistence that misrepresentation is the *sine qua non* for equitable suspension of limitations, it offers little response to petitioners' arguments. Instead of refutation, the Government adds weight to each of the four independent grounds upon which we urge the appropriateness of limitations-suspension in the present case:

i. Petitioners' first ground for limitations-suspension (Br. pp. 33-36) is that they relied on the Government's initial offer of restitution at 2% and now seek recovery on the basis of its change of position in 1964, after this Court's grant of review in *Aratani*. We find only confirmation of this point in the Government's Brief. Thus, the Government concedes (Br. pp. 14-15) that in 1964 after the agreed settlement in *Abe* "the present petitioners asked for similar treatment of their claims" which request "the Attorney General rejected". And in the circumstances of this administrative denial by the Attorney General, the Government's affirmation in the pending *Crown Coat* case (No. 371, October Term, 1966, p. 14) of the general principle that limitation runs only from the time of administrative denial of a statutory claim is applicable here:

> "An action for a statutory refund arises only after there has been a demand by the plaintiff and a refusal of that demand that may be characterized as a breach of duty (*e.g., United States* v. *Taylor*, 104 U.S. 216, 221-222); a disbursing officer's action for relief from liability for lost funds arises only after accounting officers have refused to credit his accounts with the amount in dispute (*e.g., United States v. Smith*, 105 U.S. 620; *United States* v. *Clark*, 96 U.S. 37, 43-44). Compare p. 10, n. 4, *supra*. In such cases until administrative action is taken there is no breach of duty by government

officials and, consequently, no basis for a damages claim."

ii. Petitioners' second ground for limitations-suspension (Br. pp. 36-38) is that between 1961 and 1964 they reasonably awaited the outcome of the *Aratani-Abe* litigation, and filed this suit before expiration of that litigation after the Government refused them the equal treatment they had reasonably anticipated. We find no answer to this point in the Government's Brief. Instead the Government attacks petitioners' emphasis as an aggravating circumstance upon the fact that the vast majority of the 4,100 claimants before this Court had no counsel to advise them of any technical distinction between the claims litigated in *Abe* and their own claims. Actually, the Government does not anywhere deny the documented showing (see Pet. Br. pp. 33, 37) of the absence of counsel. Instead, it urges (Br. pp. 25-26) that the few "named petitioners" at bar *were* represented before the OAP by "counsel of their own selection", and accordingly cannot be heard to assert that the great majority of the 4,100 claimants in this class suit had no counsel.

This Government contention would be of little significance at best, for petitioners' contention is only fortified by, rather than dependent upon, their lack of counsel. But actually the Government's facts concerning the named plaintiffs are absolutely wrong, resulting from a gross oversight. In enumerating the named petitioners in *Honda* (Resp. Br. pp. 11-12) the Government omits the four claimants whose affidavits (R. 10-17) attested language difficulty, lack of counsel, etc., and states that they are not persons "named in the complaint and therefore before this Court" (Resp. Br. p. 25, n. 13). In so stating the Government has overlooked the fact that following the initial filing of the *Honda* complaint, and long before the District Court acted on the Government's

motion to dismiss, these four claimants *were* made individual *named* plaintiffs in the action. On January 12, 1965, the four affiants were formally listed "as additional named plaintiffs" in the *Honda* suit. See *infra, Appendix*, p. 16. Pursuant to a request by counsel for petitioners on January 31, 1967, the Department of Justice has searched its records and confirmed that, unlike the other named petitioners in the *Honda* case, three of the four affiants joined as named plaintiffs on January 12, 1965—Kyuji Hozaki, Jiro Kai, and Shigeo Kumashiro—have had *no* counsel of record before the OAP in the 20 years that their claims have been pending. Since these claimants without counsel are among the "named plaintiffs" in this action, this Court *may* properly consider as an aggravating circumstance the verified fact that the great majority of the 4,100 class action petitioners before the Court had no counsel in the years when they expected that the ultimate resolution of the *Aratani-Abe* litigation would be equally extended to their own claims by the Government.[2]

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[2] Apart from the mistaken claim that all of the named plaintiffs had counsel, the Government makes no answer to the absence-of-counsel equity in the present case. Nor could the Government be heard to suggest that petitioners' failure to obtain counsel should somehow be charged against them. For example, it could not be seriously entertained that petitioner Jiro Kai, who had an OAP claim for a $20 deposit account (R. 12), should have sought counsel and instituted separate legal action when the *Abe* case was already pending. Even for experienced attorneys it was unexpected that the Government would decide to pay hundreds of Yokohama Bank claimants at the pre-war exchange rate while declining to grant the same standard of payment to thousands of other Yokohama Bank claimants though the funds are on hand for that purpose. And to a petitioner such as Mr. Jiro Kai, an 84-year old non-English speaking Japanese immigrant without legal counsel (R. 12) whose $20 account was taken in 1941 but upon which the Government has yet to offer him more than a 30¢ return, its conduct is literally beyond possibility of intelligible explanation.

The fact that the *Abe* claimants, with larger deposits, did retain counsel to pursue their rights made petitioners at bar all the more certain that their rights would be equally protected if the *Abe* litigation should establish that *depositors generally were entitled to the payment of their claims on the basis of a more favorable exchange rate than that offered by the*

iii. Petitioners' third ground for limitations-suspension (Br. pp. 39-43) is the Government's involvement in their "delay" in filing suit by its own 20 years of delay, confusion and discouraging representations. Apart from the Government's insistence that OAP was guilty of no deliberate misrepresentation to petitioners, the Government makes little response to this point.[3] It does suggest (Br. p. 25) that the circumstance that most of the petitioners were burdened in understanding the Government's communications by lack of literacy and command of English is not before the Court because the affiants on this score were not "named in the complaint". The Government's oversight of the January 12, 1965 addition of the affiants as named plaintiffs has been discussed above and needs no repetition here. It is, however, worthy of note that the Government never actually denies that its representation to petitioners in 1958, that no more than a 2% return was due them under the law was an *erroneous* representation. Not only did the Government settle the *Abe* litigation by paying 100% of principal at the Pearl Harbor Day rate to those claimants, it now informs this Court (Br. p. 16, n. 11) that in at least one new case—that of Mrs. Kondo—it is "ready to

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Government. This is obviously what Mr. Kai had in mind when he said: "I saw in the Japanese newspaper that a court suit was or would be filed seeking to obtain for the yen claimants the proper amount for their claims. I believed, therefore, I would be protected. With the small amount of my claim, I do not see how I could go to court myself . . ." (R. 12).

[3] About all the Government says in defense of its 20-year delay is its *ipse dixit* that it acted "as promptly as was feasible in the circumstances . . ." (Br. p. 18). But to a claimant whose savings deposit evaporated on Pearl Harbor Day, 17 years was hardly a "prompt" OAP determination that he was entitled to only 2% and 20 years was hardly a "prompt" time within which to start the running of the 60-day limitation period. Certainly, a Congress which had in 1946 been assured by the OAP of "all possible dispatch" (Pet. Br. p. 42, n. 15) and which then created a 60-day limitation period on this basis, could hardly have expected inexorable application of that 60-day limitation after another 15 years of Government delay.

make payment" on the *Abe* basis to one who was not a party to that case.[4] It seems clear, therefore, that the Government now concedes the error of its 1958 representation to petitioners that no more than 2% was due them as a matter of law. That error, of course, was the "misrepresentation" which has led to the tragic sequence of events involved in this case.

iv. Petitioners' fourth ground for suspension (Br. pp. 43-45) is that sheer injustice results if the Government may abuse limitations to bar recovery by claimants whose statutory eligibility for payment it has long conceded. Not only does the Government fail to respond to this contention, it once again concedes that petitioners are entitled to payment unless the 60-day limitations period bars them. The Government explains (Br. pp. 14-15) that, when petitioners asked in 1964 for similar treatment to that accorded the

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[4] The Government's offer to Mrs. Kondo (made *after* the petition for certiorari was filed) to pay her 100% of principal on her deposit account, in the same manner as was accorded to the *Abe* claimants, dispels the Government's suggestion that the *Abe* settlement was merely some form of negotiated "compromise". The Government's initial 1958 offer was based on the representation (R. 6) that the Government had no authority to recognize other than the post-war exchange rate in liquidating the depositors' claims. The later *Abe* settlement was in fact a recognition that the post-war conversion ratio was *not* the proper measure for payment of yen deposit claims under the statute; the settlement, *for 50 times the post-war rate*, was a change of position not a mere compromise of dollars. The Government, after all, is essentially a trustee of the vested assets for payment of validated debt claims and cannot accord disparate treatment to similarly situated claimants (see Pet. Br. p. 37, n. 13). Indeed, the Government appears to concede that petitioners *are* entitled to the same payment formula as their fellow-claimants in *Abe* if their suit is not barred by limitations. In reciting the basis of the Attorney General's refusal in 1964 to afford petitioners equal treatment (Resp. Br. pp. 14-15), only the limitation period is cited as the reason for the Attorney General's rejection of their claim, and no pretense is made that absent the limitation bar the Government could simply decline to petitioners the payment it granted the *Abe* claimants. The grounds which constrained the Government to reverse its original view that the post-war conversion ratio was applicable to yen-deposit debt claims are set forth in the petition for certiorari in the *Aratani* case and require no elaboration here.

Abe claimants, the Attorney General rejected their demand *"being of the view that those claims were barred by the limitation period prescribed in Section 34(f) . . ."* We take this to be a representation that the only ground for refusal to grant petitioners the same treatment as the *Abe* claimants was the 60-day limitations bar, and that in all other respects the Government continues to deem them entitled to recover.[5]

It is a surprising contention that a Government agency instructed to pay valid debt claims from vested assets under the Trading With the Enemy Act should refuse to do so *on no substantative* ground, but simply because, if the holders of the claims should thereafter sue, the Government might successfully interpose the procedural objection of limitations. The judicially-created doctrine of novation has long served to bar a defendant from pleading limitations to avoid a liability which he has recognized anew after the initial period has run. The Government's statement to this Court that its reason for refusing to honor petitioners'

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[5] The Government's additional reference to the fact that "by Section 39 of the Act, Congress had intended all moneys remaining in vested alien property accounts to be transferred to the War Claims Fund . . ." (Resp. Br. 15) avails it nothing. To begin with, any War Claims Fund argument is wholly circular since Congress never intended that Fund to be enlarged from vested assets *except* to the extent that moneys were left over after all Trading With the Enemy Act claims were paid. If petitioners' claims are not barred by the statute of limitations, the War Claims Fund has nothing to do with them. Moreover, the War Claims Fund suggestion is a manifest afterthought. To our knowledge, the Government has never before suggested that a legitimate debt claimant should have his rights defeated because Congress provided for alternative use of vested assets after all legitimate debt claimants had been paid. When petitioners urged that the rule of the *Abe* settlement be applied to them, it was not the War Claims Fund but *administrative inconvenience* which was cited to them. See Pet. for Cert. p. 9, n. 4. That the Yokohama Bank assets would go to the War Claims Fund if petitioners' equities should be rejected is of no more significance than the fact that, in the absence of Section 39, these assets would have gone into the general funds of the Treasury.

1964 request for payment was simply the 60-day limitation period, may alone warrant this Court's application of the doctrine of novation. Moreover, this is an action to require the honoring of claims by the Government pursuant to an Act of the Congress, wherein more than merely competing private interests are involved. Where the Government is acting in a fiduciary capacity the public interest is certainly preserved by achievement of a just result. The grossest disregard for the Congress and the rights of citizens inheres in the Government's representation that the ground upon which in 1964 it refused to honor 4,100 statutory claims was its anticipation of the limitations bar rather than any doubt as to their validity.

3. *Sovereign Immunity.* Apparently recognizing the slimness of its equities before this Court, the Government's Brief regresses to the argument that sovereign immunity bars a limitations suspension under this statute no matter how compelling may be the considerations of justice and equity which call for tolling or estoppel. But petitioners have demonstrated (Br. pp. 19-23) that since this case arises from summary Government appropriation of private property, every presumption should be indulged *against* the inference that sovereign immunity precludes equitable suspension of the Act's limitation period. As we anticipated, the Government in its Brief (p. 37) makes the "quibbling distinction" that in vesting the Yokohama Bank's assets it "did not seize any legal or equitable interest of the bank's creditors . . ." To our showing that for Fifth Amendment purposes this is a distinction without a difference, the Government chooses to make no answer. Moreover, in arguing that Congress was not required to permit any opportunity of suit by debt claimants, fair or unfair, the Government also chooses to disregard the expressed Congressional view when enacting this statute (see Pet. Br.,

p. 21)—that fair return to debt claimants was required precisely *because* "but for the vesting of their debtors' property, they would presumably have been able to pursue ordinary remedies against the debtors."

The Government's Brief is silent on the critical fact that by seizing and vesting private funds, the Government precluded pursuit of the "ordinary remedy" of certificate conversion from domestic assets of the Yokohama Bank and thus effected a "taking" of 98% of petitioners' assets lost by the wartime decline in the value of the yen. We have emphasized to this Court that following Pearl Harbor the Government's seizure and vesting of the Yokohama Bank funds froze and made unavailable the assets from which petitioners might have obtained payment on their deposit certificates. The Government's Brief (p. 6) admits that, from the seizure and vesting of the Yokohama Bank's funds to petitioners' renewed opportunity after the war to cash their deposits in Japan, "in the intervening years, the dollar value of the Japanese *yen* had declined greatly"—to less than 2% of its former value. As the devaluation loss of petitioners' property rights was caused by the action of the United States Government alone, it is the Government alone rather than the bank in Japan to whom petitioners must look, and under the Fifth Amendment have a right to look, for just compensation.

On these facts it is clear that there has been a "taking" of petitioners' property. The Government concedes that the private funds from which petitioners might have redeemed their deposit certificates were seized and frozen by the Government after Pearl Harbor Day, and that during the period when they remained so frozen petitioners' yen deposit certificates dropped to a fraction of their former value. It is simply incredible to suggest that under the Fifth Amendment petitioners were nevertheless owed

no fair opportunity of redress from the vested private assets of their debtor, and that the Government can now interpose sovereign immunity to prevent equitable tolling or estoppel in a suit not for compensation from the Treasury but for a return from expropriated private assets. Indeed, the Government cites not a single line from the statute or its legislative history to support its contention that sovereign immunity then existed which the Congress was waiving in the statute. On the contrary, the silence of Congress on the issue of sovereign immunity underlines the view that it deemed the Alien Property Custodian merely a trustee charged with equitable distribution rather than acting in the capacity of the sovereign.

4. *Just Compensation.* Proceeding from its premise that sovereign immunity may be interposed against petitioners' claims, the Government urges (Brief pp. 29-36) that the Trading With the Enemy Act's 60-day limitations period may not be estopped or tolled because the Government is the defendant in the action. Since the sovereign immunity premise falls before the Fifth Amendment, the Government's argument must fail. The cases chiefly relied on by the Government for a strict construction of limitations arose in genuine sovereign immunity situations and simply have no bearing here.[6] Far from strict construction to preserve

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[6] Of this Court's rulings cited by the Government only *Soriano* arose from a Government "taking" situation, and there the relationship between sovereign immunity and the Just Compensation Clause was not adjudicated by this Court. In *Soriano* this Court emphasized that after the Government passed upon the petitioner's claim "within less than three months", he nevertheless delayed his suit for another two years without apparent cause for delay. In *Soriano* the Government acted in three months while here it delayed for twenty years; there the limitations period was six years while here it is sixty days; there no reason for delay was apparent while here petitioners were misled by the Government's confusing and erroneous representations, reasonably believed themselves protected by the pending *Abe* litigation, and sued immediately when the Government arbitrarily

sovereign immunity, the present case with its context of summary Government taking requires the broadest and fairest reading of the claimants-rights provisions of the statute. In this respect it is notable that the Government chooses to disregard the documented showing (Pet. Br. pp. 24-25) that in the Trading With the Enemy Act the Congress itself recognized that practical sense and fairness may require limitations tolling. Instead of addressing itself to this legislative evidence, the Government's Brief (p. 31) argues that courts may never estop or toll limitations under this statute because the Congress "granted no authority to the Attorney General or any other official to waive the limitation." Of course this approach, which would handcuff the judicial power of equitable tolling and estoppel, is utterly at odds with this Court's decisions in *Glus*, *Burnett* and *Stearns*, where far longer statutes of limitation were tolled in the absence of express Congressional authority. In any event, the argument that "in suits against the United States, the statute of limitations will not be tolled by implication" (Resp. Br. p. 31, n. 19), whatever may be its validity elsewhere, simply has no meaning in this suit in the nature of an action for a return of property seized by the Government, which the Just Compensation and Due Process Clause safeguard from application of sovereign immunity.[7]

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denied them equal treatment in 1964. Moreover, apart from these vital differences, the *Soriano* rationale that Congress was "entitled to assume that the limitation period it prescribed meant just that period and no more", cannot survive the rationale and holdings in *Glus* and *Burnett*.

[7] Our Brief (pp. 26-30) also urges that judicial authorities generally make the Government amenable to estoppel and tolling of limitations once Congress has authorized suit against the sovereign. In a footnote (p. 35, n. 26) the Government would distinguish these rulings on a variety of grounds too ephemeral to require detailed response. But we do desire to emphasize again that the sovereign immunity argument—which these judicial rulings reject in their application of estoppel to the Government—lacks credence when it is presented in cases where Congress *has* in fact waived any immunity which might have existed. *Munis* and this Court's

5. *Payment.* In a last gasp effort, the Government abandons the question of limitations-suspension and suggests instead that practical considerations should preclude honoring petitioners' claims unless Congress first acts to give them relief. The Government suggests that there are 1500 other claimants who "withdrew their claims in response to the Attorney General's 1958 letter" whose interests should "also be considered" (Resp. Br. pp. 28-29). It is noteworthy that the Government has never before given a nod to these 1500 claimants, but now suddenly interposes them to impair the rights of the 4,100 claimants who are before the Court. If, however, the Government is not shedding crocodile tears, but is at long last genuinely concerned to pay the 1500 Yokohama Bank depositors who were led by its 1958 letter into sending in withdrawal cards, the matter is easily resolved. As the Government itself points out (Br. p. 12), two of the named plaintiffs in the *Honda* suit are among those 1500 claimants who sent in notice of cancellation cards in 1958. If this Court rejects the Government's limitations plea and reinstates the suit, petitioners naturally stand ready—pursuant to their consistent position that similarly situated claimants should have been similarly treated—to include in a District Court settlement similar to that in *Abe* the 1500 "withdrawal card" claimants concerning whom the Government now expresses concern. While the remaining vested assets of the Yokohama Bank are, we believe, sufficient to include with the 4,100 litigants these 1500 additional claimants, should the fund prove inadequate for full distribution, then the normal proration formula of the statute would, of course, apply to require equal diminution of every claimant's recovery.

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other F.T.C.A. rulings demonstrate that it will not narrow the Congressional grant of jurisdiction to sue the Government by importing special limitations on its behalf which other litigants do not enjoy. See also *Seaman* v. *Mumford*, 118 App. D. C. 282, 335 F. 2d 704.

Neither in these 1500 claimants with withdrawal cards, nor elsewhere, can the Government find a scintilla of equity or justice for its position.

* * * * * * *

The Government concedes that petitioners are eligible debt claimants. Nowhere has it denied the injustice of barring petitioners from the statutory recovery due them. Nor does it conjure up the slightest prejudice resulting from the fact that in 1961 they awaited the outcome of the *Aratani-Abe* litigation and sued in 1964 when the Government denied their request for equal treatment. Instead of seeking "to redress as far as possible the regrettable injuries suffered by Japanese-American citizens during World War II" (Br. of State of Cal., p. 1), the Government would heap a new and further injury upon those who have already suffered far too much.

With injustice manifest and prejudice absent it is submitted that the ruling below should be reversed and the *Honda* action reinstated to afford petitioners the same alien property disbursement given to their fellow-claimants in the *Abe* litigation.

Respectfully submitted,

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APPENDIX

Filed Jan. 12, 1965

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1179-64

AYAKO HONDA et al, *Plaintiffs*,

v.

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